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HAY v. HER

HIGH COURT MALAYA, KUALA LUMPUR
EVROL MARIETTE PETERS J
[ORIGINATING SUMMONS NO: WA-24F-358-12-2023]
29 AUGUST 2024

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Abstract – *(i) The purpose of O. 7 r. 2(1A) of the Rules of Court 2012 ('ROC') is to ensure that the legal foundation for an application is clearly identified, allowing both the court and the opposing party to understand the basis of the claim. However, O. 7 r. 2(1A) does not demand an elaborate or detailed recitation of the provision; rather, it requires only that the relevant provision be sufficiently referenced in order to provide clarity; (ii) An application under O. 24 r. 7A of the ROC is typically filed when a plaintiff is unable to sufficiently articulate or formulate his intended legal claim due to a lack of information or evidence. The rule exists to allow a plaintiff to seek discovery of specific documents or information necessary to construct a viable claim.*

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CIVIL PROCEDURE: *Discovery – Application for – Application for discovery of identification documents of six individuals – Whether applicant seeking information or documents – Whether application aligned with scope of rule – Whether documents sought in possession of other party – Whether applicant had genuine cause of action against other party – Rules of Court 2012, O. 24 r. 7A*

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The plaintiff, a Cambodian citizen, and the defendant, originally a Malaysian before she acquired Cambodian citizenship, were married in 2019 and blessed with a son in 2022. In 2023, the defendant returned to Malaysia with the child and neither had since returned to Cambodia. Meanwhile, the plaintiff had applied for divorce in Cambodia and subsequently obtained a court order in his favour. The plaintiff applied, at the High Court of Malaya, for the return of the child to Cambodia. The High Court granted, *inter alia*, interim custody of the child to the defendant; the plaintiff was granted supervised access to the child. While exercising his access rights, the plaintiff alleged that six men, who were accompanying the defendant, had intimidated and harassed him and had made defamatory statements directed at him. In the present application, the plaintiff sought the discovery of the identification documents of the six individuals in question and sought to obtain their names, addresses, photographs and national registration identity cards ('NRIC') or passports. In support of his application, the plaintiff submitted that the six individuals played a key role in the events that would lead to the legal action and, as such, their identities were crucial to the proceedings. The defendant argued that what the plaintiff was actually seeking was information rather than documents and, since O. 24 r. 7A of the Rules of Court 2012 ('ROC') specifically pertained to the discovery of documents, the application

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should be dismissed on the grounds that it did not align with the scope of the rule. The issues that arose for determination were: (i) whether the plaintiff was seeking information or documents; (ii) whether the documents sought were in the defendant's possession; and (iii) whether the plaintiff had a genuine cause of action against the defendant. The parties raised preliminary objections against each other where: (i) the defendant (a) highlighted that the plaintiff's originating summons ('OS') failed to clearly specify which particular limb of O. 24 r. 7A of the ROC which the plaintiff was relying upon to invoke the court's jurisdiction, rendering the said OS ambiguous and procedurally flawed; and (b) raised an issue of discrepancy between the date the plaintiff's affidavit in support was affirmed and the date indicated by the notarial certificate as to when such affidavit in support had been affirmed; while (ii) the plaintiff urged the court to disregard the further affidavit filed by the defendant in response to the plaintiff's affidavit in reply.

Held (dismissing application):

(1) While O. 7 r. 2(1A) of the ROC clearly mandates that every OS must specify in its intitulement the provision under which the application is being made, it does not require that such provision be detailed in exhaustive terms. The defendant's argument, which hinged upon the alleged inadequacy of the plaintiff's intitulement for not detailing the provision, had misinterpreted the intent and scope of O. 7 r. 2(1A). The rule was designed to prevent ambiguity, not to impose an unnecessary burden of verbosity on the applicant. As long as the intitulement correctly points to the specific legal provision that grounds the application, the requirements of O. 7 r. 2(1A) are deemed to have been met. Order 24 r. 7A was cited in the intitulement of the OS. This was sufficient to satisfy the requirement under O. 7 r. 2(1A). (paras 15 & 17-19)

(2) Even though a discrepancy did exist in the dates in the affidavits, this error was addressed in an affidavit affirmed by one MS Rajendran, an advocate and solicitor, as well as a notary public, who had explained that the inconsistency was merely an oversight. Given this explanation, the discrepancy did not constitute a substantive error that would justify disregarding the plaintiff's affidavit in support in its entirety. The oversight was minor and did not affect the material content or the validity of the affidavit in support. (para 21)

(3) The defendant's filing of a further affidavit was a direct response to new issues introduced by the plaintiff in his affidavit in reply. It was well within the rights of a party to address newly-raised matters to ensure a fair and complete presentation of the case. As such, the plaintiff could not now object to the defendant's further affidavit, as it was necessitated by the plaintiff's own introduction of additional arguments or evidence. The plaintiff's attempt to challenge the defendant's right to respond in this manner was unfounded. (para 23)

(4) Names and addresses of individuals did not constitute documents within the meaning of O. 24 r. 7A of the ROC. Order 24 r. 7A was designed to facilitate the discovery of tangible documents that are not in the possession, custody or control of a party – not to compel the disclosure of personal information or details about individuals. The distinction between documents and information was a significant one and this application was, therefore, based on a fundamental misunderstanding of the intended scope of O. 24 r. 7A. An application that included non-documents, such as this one, was deemed to be incorrectly premised. This application did not satisfy the requirements of O. 24 r. 7A and ought to be dismissed. (paras 31-33)

(5) The plaintiff was required to prove that the defendant was in the possession of the documents sought. It was not the defendant's responsibility to disprove possession of documents, particularly when the plaintiff had not provided sufficient evidence to establish that the defendant had them. The burden could not be shifted to the defendant, to prove a negative, that was, that she did not possess the documents sought. Furthermore, just because the six individuals were part of the defendant's security detail, it did not necessarily follow that the defendant would have detailed information or documents concerning them. Security personnel often operate independently and their operational details might be managed by a separate department or individual rather than the person they are protecting. Thus, the plaintiff's assumption that the defendant would inherently have possession of such documents was unfounded. Additionally, the plaintiff had filed a police report and requested immediate police intervention for his safety, mentioning that the entire incident was captured on CCTV. Since the police had investigated the matter, the plaintiff had a clear and viable option to seek their assistance in identifying the six individuals who were allegedly involved in the accident. (paras 39, 40 & 44)

(6) An application under O. 24 r. 7A of the ROC is typically filed when a plaintiff is unable to sufficiently articulate or formulate his intended legal claim due to a lack of information or evidence. In this case, however, the plaintiff's own affidavits and submissions suggested that he was already fully aware of his intended claim against the defendant. The plaintiff had clearly outlined his allegations and the basis for holding the defendant vicariously liable. Given that he appeared to have a well-defined claim in mind, the premise for invoking O. 24 r. 7A was not met. This application seemed redundant and unnecessary as the plaintiff did not demonstrate that he lacked the necessary information to move forward with his claim. Furthermore, O. 24 r. 7A(3) stipulates that the individual against whom an order is being sought is anticipated to be a party to any subsequent legal proceedings. In the context of the present case, the evidence presented suggested that it was improbable for

the defendant to be involved in any future proceedings. There was no evidence to suggest that the defendant was the principal or employer of the six individuals in question. In fact, the evidence indicated that these individuals were neither servants nor agents of the defendant but, rather, independent contractors. By defining these six individuals as independent contractors, the defendant's legal responsibility for their actions was significantly limited. The absence of control over their work methods and the independence of their operational decisions supported the conclusion that the defendant could not be held liable for any action the contractors may have taken. There was no basis to suggest that the plaintiff had a legitimate cause of action against the defendant. (paras 49-51, 54, 57 & 58)

Obiter:

(1) Courts are generally disinclined to hinder the administration of substantive justice, especially when such technical errors do not cause prejudice to the opposing party. This approach reflects a broader commitment to justice, where the primary goal is to resolve disputes based on the substantive rights and obligations of the parties involved. It recognises that procedural rules, while important, should not be used as instruments of injustice or as obstacles to the fair determination of a case. Where no harm or disadvantage is suffered by the opposing party, the courts are more likely to permit the correction of procedural irregularities, thereby facilitating a just outcome that reflects the true merits of the case. (para 24)

Case(s) referred to:

ABX Logistics (Malaysia) Sdn Bhd v. Overseas Bechtel (Malaysia) Sdn Bhd [2003] 7 CLJ 357 HC ***(refd)***

Ashworth Hospital Authority v. MGN Ltd [2002] 1 WLR 2033 ***(refd)***

British Steel Corporation v. Granada Television Ltd [1981] AC 1096 ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

National Feedlot Corporation Sdn Bhd & Ors v. Public Bank Bhd [2023] 10 CLJ 430 CA ***(refd)***

Ong Commodities Pte Ltd v. Kek Tek Huat Sdn Bhd & Anor [2015] 10 CLJ 585 HC ***(refd)***

Re Coles And Ravenshear [1907] 1 KB 1 ***(refd)***

Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin & Other Appeals [2017] 10 CLJ 296 CA ***(refd)***

Reebok (M) Sdn Bhd v. CIMB Bank Bhd [2019] 9 CLJ 230 CA ***(refd)***

RHB Bank Bhd v. Moon Trading Sdn Bhd [2014] 5 CLJ 443 CA ***(refd)***

Tatiana Nandha Kumar Krishnasamy v. Meridian Surf One Sdn Bhd & Anor [2018] CLJU 1207; [2018] 1 LNS 1207 HC ***(refd)***

UG Hotel Property Sdn Bhd v. Chee Soo Lam & Anor [2012] CLJU 1436; [2012] 1 LNS 1436 CA ***(refd)***

A *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2001] 2 CLJ 31 CA* ***(refd)***
Yekambaran Marimuthu v. Malayawata Steel Bhd [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 7 r. 2(1A), O. 24 rr. 2(1A), 7A(3), (5)

B *For the plaintiff - Chris Chin & Uma Rani; M/s Shang & Co*
For the defendant - Rajan Navaratnam & Vinu Kamalanathan; M/s Vinu & Lopez

Reported by Najib Tamby

JUDGMENT

C **Evrol Mariette Peters J:**

Introduction

[1] This is the plaintiff-husband's application ("this application") for discovery of the identification documents of six individuals who were
D present with the defendant-wife at the relevant place and time as specified.

[2] In the interest of privacy of the parties concerned and sensitivity of the issues, the plaintiff and defendant have been anonymised respectively as HAY and HER.

E **The Factual Background**

[3] The plaintiff, a Cambodian citizen, and the defendant, originally a Malaysian citizen who later acquired Cambodian citizenship (collectively "the parties"), were married in February 2019. Their union was blessed with a son ("the child") in February 2022.

F **[4]** In April 2023, the defendant returned to Malaysia with the child, and neither has since returned to Cambodia. Meanwhile, in May 2023, the plaintiff filed for divorce in Cambodia and subsequently obtained a court order in June 2023, in his favour.

G **[5]** In September 2023, the plaintiff filed an application in the High Court of Malaya under case number WA-24F-281-09-2023, seeking, among other things, the return of the child to Cambodia.

[6] In November 2023, this court granted, amongst others, interim custody of the child to the defendant. The plaintiff was granted supervised
H access to the child, with visits to occur in a public location at specified times every Saturday and Sunday.

[7] On 19 November 2023, while exercising his access rights, the plaintiff alleged that he was intimidated and harassed by six men who were accompanying the defendant ("the incident"). The plaintiff subsequently
I lodged a police report on 20 November 2023 regarding the incident.

[8] On 13 December 2023, the plaintiff filed this application.

The Issues

[9] At the outset, the court had to address the preliminary objections raised by both parties regarding the originating summons and affidavits.

[10] The substantive issues for consideration were (i) whether the plaintiff, in this application, sought information or documents; (ii) whether the documents sought were in the defendant's possession; and (iii) whether the plaintiff had a genuine cause of action against the defendant.

[11] The preliminary objections as well as this application were dismissed for the following reasons.

Contentions, Evaluation, And Findings

Whether Preliminary Objections Regarding The Originating Summons And Affidavits Should Be Allowed

[12] Preliminary objections were raised regarding the plaintiff's originating summons and affidavits filed by both parties.

[13] With respect to the originating summons, the defendant contended that it failed to clearly specify which particular limb of O. 24 r. 7A of the Rules of Court 2012 ("Rules of Court"), the plaintiff was relying upon to invoke the court's jurisdiction. The relevant provision states:

> Order 24 – Discovery and inspection of documents
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> Rule 7A – Discovery against other person
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> (1) An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.
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> (2) An application after the commencement of proceedings for an order for the discovery of documents by a person who is not a party to the proceedings shall be made by a notice of application, which shall be served on that person personally and on every party to the proceedings.
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> (3) An originating summons under paragraph (1) or a notice of application under paragraph (2) shall be supported by an affidavit which shall -
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> (a) in the case of an originating summons under paragraph (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court; and
>
> (b) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise

A out of the claim made or likely to be made in the proceedings or the identity of the likely parties to the proceedings, or both, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

(4) A copy of the supporting affidavit shall be served with the originating B summons or the notice of application on every person on whom the originating summons or the notice of application is required to be served.

(5) An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such C circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just.

(6) An order for the discovery of documents may -

(a) be made conditional on the applicant giving security for the D costs of the person against whom it is made or on such other terms, if any, as the Court thinks just; and

(b) require the person against whom the order is made to make an affidavit stating whether the documents specified or described in the order are, or at any time have been, in his possession, custody or power and, if not then in his possession, custody or power, E when he parted with them and what has become of them.

(7) A person shall not be compelled by such an order to produce any document which he could not be compelled to produce -

(a) in the case of an originating summons under paragraph (1), if F the subsequent proceedings had already been commenced; or

(b) in the case of a notice of application under paragraph (2), if he had been served with a subpoena to produce documents at the trial.

(8) For the purposes of rules 10 and 11, an application for an order under G this rule shall be treated as a cause or matter between the applicant and the person against whom the order is sought.

(9) Unless the Court orders otherwise, where an application is made in accordance with this rule for an order, the person against whom the order is sought shall be entitled to his costs of the application, and of complying

H **[14]** The defendant contended that this omission rendered the originating summons ambiguous and procedurally flawed, as O. 24 r. 7A of the Rules of Court encompasses several distinct sub-rules, each with different legal implications and procedural requirements. By not clearly identifying the specific sub-rule under which the plaintiff was proceeding, the originating I summons introduced unnecessary confusion and caused potential prejudice to the defendant. The defendant further asserted that the ambiguity of the

originating summons could result in an embarrassing situation for the court, as it would be forced to speculate or interpret the plaintiff's intent without clear guidance. Such a scenario could lead to procedural missteps or the misapplication of the relevant legal principles, ultimately undermining the fairness and integrity of the proceedings.

[15] I was unable to accept the contention of the defendant for the following reasons. Firstly, while O. 7 r. 2(1A) of the Rules of Court clearly mandates that every originating summons must specify in its intitulement the provision under which the application is being made, it does not require that such provision be detailed in exhaustive terms. Order 7 r. 2(1A) of the Rules of Court reads:

> Order 7 – Originating summonses: general provisions
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> Rule 2 – Forms of originating summons
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> …
>
> (1A) Every originating summons **shall state in its intitulement any provision of these Rules** and any provision of any written law under which the Court is being moved. (emphasis added)

[16] The purpose of O. 7 r. 2(1A) of the Rules of Court is to ensure that the legal foundation for an application is clearly identified, allowing both the court and the opposing party to understand the basis of the claim. However, O. 7 r. 2(1A) of the Rules of Court does not demand an elaborate or detailed recitation of the provision – rather, it requires only that the relevant provision be sufficiently referenced to provide clarity.

[17] The defendant's argument, which hinged on the alleged inadequacy of the plaintiff's intitulement for not detailing the provision, had misinterpreted the intent and scope of O. 7 r. 2(1A) of the Rules of Court. The rule is designed to prevent ambiguity, not to impose an unnecessary burden of verbosity on the applicant. As long as the intitulement correctly points to the specific legal provision that grounds the application, the requirements of O. 7 r. 2(1A) of the Rules of Court are deemed to have been met.

[18] Upon examining the originating summons in the present case, it was noted that O. 24 r. 7A was cited in the intitulement. In my view, this was sufficient to satisfy the requirement under O. 7 r. 2(1A) of the Rules of Court.

[19] Therefore, the defendant's preliminary objection lacked merit, as the plaintiff had fulfilled the essential requirement of identifying the applicable provision, and there was no procedural necessity for a more detailed citation.

[20] Regarding the preliminary objection concerning the affidavits, the defendant raised an issue of discrepancy between the date the plaintiff's affidavit in support was affirmed, and the date indicated by the notarial certificate as to when such affidavit in support had been affirmed.

[21] While it was true that a discrepancy existed in the dates in the documents alluded to, this error was addressed in an affidavit affirmed by one MS Rajendran, an advocate and solicitor, as well as a notary public, who had explained that the inconsistency was merely an oversight. Given this explanation, the discrepancy did not constitute a substantive error that would justify disregarding the plaintiff's affidavit in support in its entirety. The oversight was minor and did not affect the material content or the validity of the affidavit in support. Therefore, there was no legal basis to invalidate or dismiss the affidavit in support based on this technical issue.

[22] The plaintiff, on the other hand, urged the court to disregard the further affidavit filed by the defendant on 1 April 2024, in response to the plaintiff's affidavit in reply, which was filed on 21 March 2024.

[23] I was unable to accept the plaintiff's contention in this regard. The defendant's filing of a further affidavit was a direct response to new issues introduced by the plaintiff in his affidavit in reply. It is well within the rights of a party to address newly raised matters to ensure a fair and complete presentation of the case. As such, the plaintiff could not now object to the defendant's further affidavit, as it was necessitated by the plaintiff's own introduction of additional arguments or evidence. The plaintiff's attempt to challenge the defendant's right to respond in this manner was, therefore, unfounded.

[24] At this juncture, it was crucial to reaffirm the well-established legal principle that courts are generally disinclined to allow technicalities to hinder the administration of substantive justice, especially when such technical errors do not cause prejudice to the opposing party. This approach reflects a broader commitment to justice, where the primary goal is to resolve disputes based on the substantive rights and obligations of the parties involved. It recognises that procedural rules, while important, should not be used as instruments of injustice or as obstacles to the fair determination of a case. Where no harm or disadvantage is suffered by the opposing party, the courts are more likely to permit the correction of procedural irregularities, thereby facilitating a just outcome that reflects the true merits of the case.

[25] This jurisprudential trend is discernible in numerous precedents, including *Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin & Other Appeals* [2017] 10 CLJ 296; *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248; and *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31.

[26] Considering the principle that the 'relation of the rules of practice to the work of justice is intended to be that of "handmaid rather than a mistress"; as articulated by Lord Collins MR in *Re Coles v. Ravenshear* [1907] 1 KB 1, there was no justification in the present case for raising technicalities that had no bearing to the substance of this application.

[27] Moreover, it had been aptly stated by Hamid Sultan Abu Backer JCA (as he then was) in *Reebok (M) Sdn Bhd v. CIMB Bank Bhd* [2019] 9 CLJ 230 that "procedural skirmishes ought not to prevail, to defeat substantive justice". A

[28] As such, the preliminary objections raised by both parties against each other were dismissed, and the court proceeded to address the substantive merits of this application. B

Whether The Plaintiff Sought Information Or Documents

[29] The guiding principles governing a discovery application have been established in the cases of *Yekambaran Marimuthu v. Malayawata Steel Bhd* [1994] 2 CLJ 581 and *ABX Logistics (Malaysia) Sdn Bhd v. Overseas Bechtel (Malaysia) Sdn Bhd* [2003] 7 CLJ 357. These cases have delineated the following key elements that must be met in order to obtain an order for discovery: C

(i) discovery can only be of a document that exists. There must, therefore, be a specific document; D

(ii) the document must be or have been in the "possession, custody or power" of the adverse party;

(iii) the document must relate to the matter in question, that is, it must be relevant to the issues in dispute; E

(iv) the order for discovery must be necessary for disposing fairly of the cause or matter or to save costs; and

(v) the documents sought by the order for discovery must be clearly identified, as an order of uncertain width, description and identity would be attended by substantial injustice. F

[30] The plaintiff sought to obtain the names, addresses, photographs, and national registration identity cards ("NRIC") or passports of the six individuals in question. In response, the defendant argued that what the plaintiff was actually seeking was information rather than documents. The defendant contended that since O. 24 r. 7A of the Rules of Court specifically pertains to the discovery of documents, this application should be dismissed on the grounds that it did not align with the scope of the rule. G

[31] Upon careful consideration, I found myself in agreement with the defendant's position, as it was clear that the names and addresses of individuals did not constitute documents within the meaning of O. 24 r. 7A of the Rules of Court. H

[32] Order 24 r. 7A of the Rules of Court was designed to facilitate the discovery of tangible documents that are in the possession, custody, or control of a party – not to compel the disclosure of personal information or I

details about individuals. The distinction between documents and information is a significant one, and this application was, therefore, based on a fundamental misunderstanding of the intended scope of O. 24 r. 7A of the Rules of Court.

[33] Given that the plaintiff sought personal details that cannot be classified as "documents," it was evident that an application that included non-documents, such as this one, was deemed to be incorrectly premised. As such, this application did not satisfy the requirements of O. 24 r. 7A and should be dismissed.

Whether Documents Sought Were In Defendant's Possession

[34] With regard to the photographs and NRIC or passports of the six individuals, it was for the plaintiff to prove that such documents must be or have been in possession of the defendant.

[35] This criterion has been emphasised in several cases pertaining to discovery including *Ong Commodities Pte Ltd v. Kek Tek Huat Sdn Bhd & Anor* [2015] 10 CLJ 585; [2016] 10 MLJ 344, where it was stated by Vazeer Alam Mydin J (as he then was), in the following passages:

> [7] The grant or refusal of an order for pre-action discovery under O. 24 r. 7A is a discretion vested in this court. The exercise of that judicial discretion is not arbitrary but done by application of set judicial principles.
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> The principles upon which the courts exercise their discretion in this regard may be summarised as follows:
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> (a) the plaintiff/applicant must have or show a *bona fide* cause of action against the persons known or unknown;
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> (b) the plaintiff/applicant must have or show a *bona fide* cause of action against the persons known or unknown;
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> (c) The plaintiff/applicant *must establish that the plaintiff/applicant requires information and documents which are in the possession, custody or control of the defendant/respondent; and*
>
> (d) the information and documents sought are necessary for the plaintiff/applicant to properly institute proceedings against persons known or unknown
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> …
>
> [22] … *In the circumstance, it would be rather illogical for the plaintiff to seek the assistance of this court for an order to compel production of documents that the defendants say they do not have in their possession or to which they have access.* The defendants cannot be faulted for the plaintiff's own recklessness or negligence in not keeping proper records of their own. Nor do the defendants owe a duty to the plaintiff to securely keep these documents and produce them as and when the plaintiff requires them.

> [23] … Such a breach cannot in any way entitle the plaintiff to an order to compel the production of these documents by the defendants, for the defendants have stated quite categorically under oath that they do not have these documents. *As such the plaintiff has failed to establish the primary requirement for the grant of a pre-action discovery order, ie, that the plaintiff requires information and documents, which are in the possession, custody or control of the defendants. In the circumstance,* it is obvious that the making of such an order would be an exercise in futility and would not serve any useful purpose. (emphasis added)

[36] This was emphasised in *National Feedlot Corporation Sdn Bhd & Ors v. Public Bank Bhd* [2023] 10 CLJ 430; [2023] MLJU 2023. In referring to *Yekambaran Marimuthu v. Malayawata Steel Bhd* [1994] 2 CLJ 581, it was stated by Nantha Balan JCA that:

> [17] It is clear from the record that the case of *Yekambaran s/o Marimuthu v. Malayawata Steel Berhad* [1994] 2 CLJ 581 (HC) ("*Yekambaran*") was referred to during the arguments in respect of Enclosure 107. The significance of *Yekambaran*'s case is that the High Court would have considered all the relevant facts and circumstances attendant upon the discovery application and duly applied the law as enunciated in that case, namely that (i) there must be a document; *ii) the document must be relevant and the document must be or have been in possession, custody or power of the person against whom the order for discovery or production of document is sought.* (emphasis added)

[37] In the present case, in her affidavit in reply, the defendant had categorically denied being in possession of the documents that the plaintiff sought:

> Saya menyatakan bahawa saya tidak pernah memiliki mana-mana dokumen yang dipohon untuk dizahirkan dan saya juga tidak mempunyai pengetahuan tentang mana-mana maklumat yang dipohon untuk dizahirkan oleh Plaintif. Dalam hal ini, saya menyatakan bahawa ia adalah mustahil dan bukan dalam kuasa saya untuk mempunyai pengetahuan dan/atau ada dalam simpanan saya dan/atau mempunyai akses kepada dokumen-dokumen berkenaan dengan 6 individu-individu yang tidak diketahui tersebut.

[38] The plaintiff argued that the defendant, who was accompanied by six individuals, should explain her denial of possession of the documents sought, on the basis of the plaintiff's claim that these individuals were part of the defendant's security detail. The plaintiff's reasoning likely stemmed from the idea that because these individuals were closely associated with the defendant and were acting in her security capacity, the defendant would have access to or control over any documents or information related to them.

[39] I was unable to accept the plaintiff's contention, the primary reason being that the burden of proof lies on the party making the claim, in this case, the plaintiff. The plaintiff was required to prove that the defendant was in

possession of the documents he sought. It had to be emphasised that it was not the defendant's responsibility to disprove possession of documents, particularly when the plaintiff had not provided sufficient evidence to establish that the defendant had them. The burden could not be shifted to the defendant to prove a negative, that is, that she did not possess the documents sought.

[40] Secondly, just because the six individuals were part of the defendant's security detail, it did not necessarily follow that the defendant would have detailed information or documents concerning them. Security personnel often operate independently, and their operational details might be managed by a separate department or individual rather than the person they are protecting. Thus, the plaintiff's assumption that the defendant would inherently have possession of such documents, was unfounded.

[41] At this juncture, it was crucial to highlight a key element in the court's reasoning, namely, a statutory declaration dated 5 December 2023 affirmed by one Zarol Afiq Montero bin Abdullah ("Zarol"), who identified himself as the Head of Security for the defendant. Zarol declared that he was responsible for assembling the security detail and that he brought along the five other individuals. Zarol's statutory declaration supported the defendant's position that she was not directly involved in managing or holding documents related to the other five individuals who were part of the security team.

[42] It was undisputed that the plaintiff was already aware of Zarol's statutory declaration and his role, raising the point that if the plaintiff sought specific documents related to the security personnel, he should have pursued a discovery application directly against Zarol. Zarol's statutory declaration effectively reinforced the defendant's stance that she was not in possession of the documents in question, further weakening the plaintiff's argument.

[43] Thirdly, the court had to also consider the plaintiff's actions following the incident. The plaintiff had filed a police report and requested immediate police intervention for his safety, mentioning that the entire incident was captured on the CCTV footage of the Westin Hotel lobby. He had even suggested that this footage be used to corroborate his complaint and identify the individuals involved.

[44] It was undisputed that the police had conducted a thorough investigation into the plaintiff's complaint. After completing their inquiries, they ultimately decided to close the case, categorising it as "No Further Action." This decision by the police, however, did not preclude the plaintiff from taking further steps to advance his case. In fact, since the police had already investigated the matter, the plaintiff had a clear and viable option to seek their assistance in identifying the six individuals who were allegedly involved in the incident. Such identification would have been critical to substantiate his claims.

[45] The plaintiff argued that the police would be unwilling to disclose the identities of these individuals. However, this assertion remained unsupported by any concrete evidence. There was no indication that the plaintiff had ever made a formal request to the police for this information, nor had he attempted to engage with them in any meaningful way to seek their cooperation. Furthermore, the plaintiff's inaction extended beyond his dealings with the police. He also failed to pursue a discovery application against Zarol, a party who might have held crucial information that could strengthen his case.

[46] By not taking these necessary steps, namely, either by seeking the police's assistance or by pursuing discovery against Zarol, the plaintiff had significantly undermined his position in the case. The plaintiff's inaction suggested a lack of diligence in pursuing all available avenues to support his claims, which, in turn, weakened his case against the defendant.

Whether The Plaintiff Had Genuine Cause Of Action Against The Defendant

[47] In his affidavit in support, the plaintiff asserted that the six individuals in question were central to the case because they had allegedly engaged in acts of harassment and made defamatory statements directed at him. The plaintiff emphasised that these individuals played a key role in the events that would lead to the legal action, and as such, their identities were crucial to the proceedings. He argued that in order to pursue legal claims effectively against both the defendant and these six individuals, it was imperative to obtain detailed information about them. This included not only their photographs and full names but also their NRIC or passport numbers and current addresses. According to the plaintiff, this identifying information was not just relevant but absolutely necessary to accurately file and prosecute the intended legal proceedings. Without this information, the plaintiff contended that he would be unable to move forward with the legal action in a manner that properly holds all responsible parties accountable.

[48] The plaintiff argued that with regard to the conduct of the six individuals, his primary objective was to hold the defendant vicariously liable for the alleged defamation and harassment committed by them. In his view, this application was of critical importance because it sought to establish the defendant's responsibility for the actions of these individuals, whom he claimed were acting under her direction or in her interest. The plaintiff's position was that the defendant should be held accountable for the wrongful acts of those individuals, which had directly impacted him, thereby justifying the need for this application.

[49] I was unable to accept the plaintiff's argument for several reasons. First and foremost, it was essential to understand the legal basis for an application under O. 24 r. 7A of the Rules of Court. Such an application is typically filed when a plaintiff is unable to sufficiently articulate or formulate

his intended legal claim due to a lack of information or evidence. The rule exists to allow a plaintiff to seek discovery of specific documents or information necessary to construct a viable claim.

[50] In this case, however, the plaintiff's own affidavits and submissions suggested that he was already fully aware of the nature of his intended claim against the defendant. The plaintiff had clearly outlined his allegations and the basis for holding the defendant vicariously liable. Given that he appeared to have a well-defined claim in mind, the premise for invoking O. 24 r. 7A was not met. This application, therefore, seemed redundant and unnecessary, as the plaintiff did not demonstrate that he lacked the necessary information to move forward with his claim. Consequently, I found that this application did not warrant the relief sought by the plaintiff.

[51] Furthermore, O. 24 r. 7A(3) of the Rules of Court stipulates that the individual against whom an order is being sought is anticipated to be a party to any subsequent legal proceedings. In the context of the present case, the evidence presented suggested that it was improbable for the defendant to be involved in any future proceedings. This conclusion is drawn based on several critical points.

[52] Firstly, the defendant cannot be held vicariously liable for the alleged defamation. This principle has been clearly articulated by the Court of Appeal in the decisions of *RHB Bank Bhd v. Moon Trading Sdn Bhd* [2014] 5 CLJ 443 and *UG Hotel Property Sdn Bhd v. Chee Soo Lam & Anor* [2012] CLJU 1436; [2012] 1 LNS 1436; [2013] 2 MLJ 235. These cases provide a robust legal framework for understanding the limits of vicarious liability, particularly in defamation cases. In *UG Hotel Property Sdn Bhd v. Chee Soo Lam & Anor*, the Court of Appeal, through Alizatul Khair JCA, clarified in the following passage:

> [21] In relation to the issue of defamation, it is clear the learned judge had attributed vicarious liability for the alleged defamation statement made by the respondent's employee (the said Michelle). In our view, the principle of vicarious liability has no application to the facts of this case. **Under the law of defamation, only the person who published (the alleged defamatory statement) can be held liable.** We therefore found the High Court judge erred in holding the appellant liable for defamation.
>
> (emphasis added)

[53] In the present case, applying the reasoning from these authorities, it became evident that the defendant could not be vicariously liable for the alleged defamation. Therefore, under O. 24 r. 7A(3) of the Rules of Court, the improbability of the defendant's involvement in future legal action was substantiated by the aforementioned legal precedents.

[54] Moreover, as previously mentioned, there was no evidence to suggest that the defendant was the principal or employer of the six individuals in question. In fact, the evidence indicated that these individuals were neither servants nor agents of the defendant, but rather independent contractors.

[55] At this juncture, it was crucial to clarify the term "independent contractor," as defined by the Court of Appeal in *RHB Bank Bhd v. Moon Trading Sdn Bhd* in the following passage:

> The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other **depends on whether or not the employer not only determines what is to be done, but retains the control of the actual performance,** in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor. (emphasis added)

[56] An independent contractor is typically understood to be an individual or entity that undertakes work for another party but maintains autonomy over the manner in which the work is performed. Unlike employees or agents, independent contractors are not subject to the same level of control or supervision by the party for whom the work is being done. This distinction is critical, as it underscored the lack of vicarious liability that could otherwise be imposed on the defendant if the individuals were employees or agents.

[57] By defining these six individuals as independent contractors, the defendant's legal responsibility for their actions is significantly limited. The absence of control over their work methods and the independence of their operational decisions support the conclusion that the defendant could not be held liable for any action the contractors may have taken. This interpretation aligns with established legal principles, reinforcing the notion that the defendant's relationship with these individuals did not give rise to vicarious liability.

[58] Given the circumstances of the present case, the six individuals were more appropriately classified as independent contractors. Consequently, there was no basis to suggest that the plaintiff has a legitimate cause of action against the defendant.

[59] On this point, I drew guidance from the cases of *Tatiana Nandha Kumar Krishnasamy v. Meridian Surf One Sdn Bhd & Anor* [2018] CLJU 1207; [2018] 1 LNS 1207 and *Ong Commodities Pte Ltd v. Kek Tek Huat Sdn Bhd & Anor* [2015] 10 CLJ 585. In the latter case, it was stated by Vazeer Alam Mydin Meera J (as he then was) in the following passages:

> [25] And, in any event, based on the documents and correspondence before the court, it is more probable than not, that the charge had been satisfied and discharged. Therefore, it would appear that the plaintiff has failed to establish the other essential requirement to support this application, which is that the plaintiff must have a *bona fide* cause of action against the defendants. An order for discovery would be granted only when the plaintiff can demonstrate to the court that it has some cause of action against the defendants, which in this case the plaintiff has failed to do.

[26] The plaintiff has stated in the grounds in support of this application that the plaintiff has reason to believe that the defendants had conducted themselves fraudulently or in an otherwise improper or negligent manner in respect of the charge; and therefore the plaintiff seeks to obtain sufficient documentary evidence from the defendants to put the plaintiff in a position where it is able to make a reasonable assessment of the situation and decide whether to institute an action against the first defendant and/or such other parties. This express desire of the plaintiff is but a manifestation of an intention to go on a fishing expedition, in hope that something may get entangled in the net and finding some material upon which a charge could be hung. That is never the purpose of a pre-action discovery order. See *ABX Logistics (Malaysia) Sdn Bhd v. Overseas Bechtel (Malaysia) Sdn Bhd* [2003] 7 CLJ 357. It is quite clear that the plaintiff has embarked on a fishing expedition and cast the net wide to seek information and documents from the defendants, which documents the defendants do not have, in the hope of stringing together a possible case against the defendants. That is not the purpose for an order of discovery. Mustil LJ in *Berkeley Administration Inc v. McClelland* [1990] FSR 381 at p. 383 held that:

> It is plain ... that the plaintiff just does not believe anything that the defendants have said in the course of this discovery, and would like to hunt around the documents in the hope that something useful would turn up enabling them to controvert what the defendants have said on oath. That is not what discovery is about at all.

The plaintiff is not entitled to an order for discovery of documents based on some hunch or intuition that the defendants have committed some wrongful or fraudulent acts against the plaintiff. The law on discovery is well settled *ie*, in the absence of a proper basis for an order for discovery, disclosure should not be allowed.

Concluding Remarks

[60] The remedy of pre-action discovery is primarily intended to enable justice to be done as stipulated in O. 24 r. 7A(5) of the Rules of Court, which reads:

> Order 24 – Discovery and inspection of documents
>
> Rule 7A – Discovery against other person
>
> (5) An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances **where the Court thinks it just to make such an order, and on such terms as it thinks just.** (emphasis added)

[61] The House of Lords in *Ashworth Hospital Authority v. MGN Ltd* [2002] 1 WLR 2033; [2002] 4 All ER 193, quoted with approval the words of Templeman LJ in *British Steel Corporation v. Granada Television Ltd* [1981] AC 1096 at p. 1132 to the following effect:

> In my judgment, the principle of the *Norwich Pharmacal* case applies whether or not the victim intends to pursue action in the courts against the wrongdoer, **provided that the existence of a cause of action is established and the victim cannot otherwise obtain justice.** The remedy of discovery is intended in the final analysis to enable justice to be done. (emphasis added)

[62] The protracted and contentious nature of the custody battle has undoubtedly exacerbated tensions between the parties, leading to an environment rife with mistrust and hostility. The numerous accusations each party has levelled against the other further illustrated the deep-seated animosity that has come to define their relationship. Against this backdrop, it became crucial for the court to scrutinise the true intent behind the filing of this application.

[63] The lack of a credible foundation for the claims presented, when considered alongside the bitter dynamics between the parties, strongly suggested that this application may not have been a genuine attempt to seek justice or resolve a legitimate legal issue. Instead, it appeared more likely that this application was another manoeuvre in the on-going custody battle between the parties, aimed at gaining leverage or inflicting further emotional or legal harm on the other side.

[64] In light of these considerations, the court had to approach this application with a heightened level of caution. The possibility that it was rooted in malice, rather than in a legitimate cause of action, should not be overlooked. It was essential to ensure that the legal process was not misused as a weapon in the parties' personal conflict, but rather remained a forum for the fair and just resolution of disputes. Consequently, the court should carefully evaluate the merits of this application, keeping in mind the broader context of the parties' on-going conflict and the potential for ulterior motives.

[65] In conclusion, following a thorough examination and prudent evaluation of all the evidence adduced, encompassing both written and oral submissions by counsel, this application was dismissed with costs.